

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEURIG, INCORPORATED,

Plaintiff,

v.

KRAFT FOODS GLOBAL, INC.,
TASSIMO CORPORATION, and
KRAFT FOODS INC.,

Defendants.

Civil Action No. 07-017-GMS

KEURIG'S OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE*
TO PRECLUDE EXPERT TESTIMONY OF DR. ALEXANDER SLOCUM

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Dated: August 15, 2008

Kraft's motion *in limine* to limit the testimony of Keurig's engineering expert, MIT Professor Alexander Slocum, is based on several erroneous assumptions.

First, Kraft incorrectly assumes that the testimony of Keurig's coffee expert Ted Lingle¹ is inadmissible, and that Professor Slocum therefore cannot reference it. As explained in Keurig's opposition to Kraft's companion motion *in limine* (D.I. 107), however, Mr. Lingle's testimony is proper and Professor Slocum is entitled to rely on it. When a patented invention encompasses multiple technical disciplines, it is addressed to people with skills in each of those fields. E.g., Enzo Biochem., Inc. v. Calgene, Inc., 188 F.3d 1362, 1373 (Fed. Cir. 1999) (patents involving "distinct arts" are to be assessed from the perspective of "the adepts of each"). In any event, Professor Slocum made his own observations about the liquid in question – independent of Mr. Lingle – that he explained in both his expert report and his deposition. Professor Slocum is entitled to share those observations with the jury.

Kraft also argues that Professor Slocum should not be permitted to mention the Singles cartridge's "aspect ratio" (i.e., the relation of its depth to its other dimensions). Kraft contends that his deposition was the first time he stated that the Singles cartridge's shallowness prevents satisfactory brewing with same-side piercing (because the water, injected through the foil lid, burrows a hole through the thin coffee bed). But Professor Slocum explained the "burrowing" phenomenon in his expert report. His use of the phrase "aspect ratio" in response to questioning at deposition was merely another way of explaining the burrowing problem. Expert reports need not use the exact same words that the expert ultimately utters at trial, so long as the concepts expounded at the deposition (and at trial) are fairly disclosed in the report, as they were here.

¹ Mr. Lingle, a recognized expert in coffee brewing and "cupping" (tasting) will testify that the liquid produced by Kenco Singles cartridges in a same-side piercing configuration is not a "beverage" as required by claim 1 of Keurig's '762 patent.

I. BACKGROUND

Professor Slocum's rebuttal report outlines numerous flaws in the invalidity theories that Kraft and its engineering expert Malcolm Taylor have articulated. Much of Professor Slocum's analysis concerns the Singles cartridge, the alleged prior art on which Kraft has focused throughout the case.

For example, Professor Slocum notes that the foil lid on a Singles cartridge (which is designed for conventional opposite-side piercing, not same-side piercing as in the '762 patent) lacks a support structure against which to press a gasket to form a reliable seal. See Slocum Rebuttal Report (Ex. A) at 21. Attempting to pierce the foil lid to accommodate an inflow of hot water therefore leads to catastrophic lid failure as Professor Slocum's tests showed. Id. at 22, 25. As Professor Slocum also notes in his report, this is precisely what Kraft itself told the European Patent Office when confronted with a Singles patent as prior art to its own patent application on the T-Disc (the Kraft product accused of infringement in this case). Id. at 21-22.

Professor Slocum's testing of Singles cartridges also revealed another problem with any attempt to use them in a same-side piercing configuration. Whatever water did traverse the foil lid into the coffee bed would "shoot[] through the coffee grounds and literally burrow[] a hole" through the coffee – rather than dispersing through the coffee bed and properly extracting the soluble coffee solids in the way the cartridge was designed to be used. Id. at 25. The burrowing problem led to production of a foul-tasting liquid that simply was not coffee. Professor Slocum concluded that the liquid would not qualify as a beverage. Id. at 25-26.

Indeed, the liquid was so appalling that Professor Slocum testified, “if I ever bought that anywhere, I’d take it right back and say I want my money back or a ... real cup of coffee.” See Slocum Depo. (Ex. B) at 209. Mr. Lingle, an expert with over three decades of experience in the coffee industry, analyzed the liquid and concurred that it was not a beverage. (Ex. A at 25).

II. ARGUMENT

A. Professor Slocum is Entitled to Rely on Mr. Lingle’s Testimony.

The first half of Kraft’s motion is moot because it turns on the incorrect premise that Mr. Lingle’s opinions are “inadmissible.” (D.I. 106 at 1). Kraft argued that point in D.I. 107, and Keurig’s opposition explains why Mr. Lingle’s testimony plainly is admissible. Mr. Lingle is a recognized expert in growing, brewing, and “cupping” (tasting) coffee, and his testimony will address a question of fact on which he has undisputed expertise (i.e. whether the liquid created through same-side piercing of a Singles cartridge is a coffee beverage).

B. Kraft Does Not Challenge Professor Slocum’s Entitlement to Describe His Own Independent Observations of the Singles Liquids.

Professor Slocum personally observed and tasted the Singles liquids obtained from the various tests described in his rebuttal report, and Keurig is entitled to ask him to describe his observations for the jury. Professor Slocum’s rebuttal report lists the objective measurements of “total dissolved solids” for those liquids, as well as Professor Slocum’s sensory observations, and includes several photographs. (Ex. A at 23, 26). Kraft’s counsel extensively questioned Professor Slocum regarding his observations at his deposition.

Notably, Kraft bears the burden of proving, by clear and convincing evidence, that the Singles cartridges produce a beverage when used in a same-side piercing configuration. Yet Kraft has offered no evidence on this point. Kraft elected not to retain a coffee expert, and its technical expert Mr. Taylor failed even to taste any of the liquids that he prepared in his tests.

See Taylor Depo. (Ex. C) at 107. By contrast, as noted above, Professor Slocum carefully evaluated the liquids and reported on his observations in his expert report. While Professor Slocum is not a coffee expert like Mr. Lingle, and will not duplicate Mr. Lingle's expert testimony, he is entitled to describe his own observations as a skilled engineer performing his experiments and observing the resulting liquids. Professor Slocum's observations of the Singles liquids are not subject to attack by Kraft and are admissible at trial.

C. Professor Slocum is Entitled to Testify Regarding the Singles Cartridge's Aspect Ratio, Which Merely Explains His Description of the "Burrowing" Phenomenon in His Rebuttal Expert Report.

Professor Slocum's testimony regarding the "aspect ratio" of the Singles cartridge clearly complies with Rule 26(a)(2)(B) because it is merely an explanation of the burrowing phenomenon that he disclosed in his rebuttal expert report.² As noted above, Professor Slocum's report explains that in a shallow Singles cartridge, the pressurized water "shoots through the coffee grounds and literally burrows a hole." (Ex. A at 25). When pressed for further details about this phenomenon at his deposition, Professor Slocum explained the connection between the "shallowness" (or flat "aspect ratio") of the cartridge and the burrowing problem:

The problem with just taking something of this aspect ratio and piercing ... and then injecting your fluid is that the water, which comes in at a reasonable pressure, shoots right through the coffee, or whatever your drink is, into the filter and then rushes out your filter, so you don't get good wetting....And I opened up cartridges...after they were used and...you would always burrow a hole. And I can discuss more in terms of scientific principles of aspect ratios if you want.

(Ex. B at 27-28) (emphasis added).

² Professor Slocum's rebuttal report describes both the "sealing" and "burrowing" problems that occur when Singles cartridges are used in a same-side piercing configuration. (Ex. A at 21, 25). Kraft's suggestion in its motion (at 3) that Professor Slocum invented the latter at his deposition is wrong. Likewise, Kraft's suggestion (at 3) that Professor Slocum's testimony raised enablement issues is baseless – indeed, prior to filing its motion *in limine* (more than two months after Professor Slocum's deposition), Kraft never even mentioned enablement. It would be far too late for Kraft to raise such a defense this close to trial.

Professor Slocum also stressed the connection between flat aspect ratios and burrowing several more times during the deposition. Id. at 152, 248-249.³

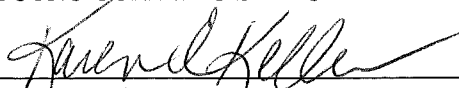
Kraft's motion tries to suggest that the flat "aspect ratio" of the Singles cartridge, and its consequences for the liquid produced via same-side piercing, were new concepts introduced in Professor Slocum's deposition. That simply is not true. Professor Slocum described the burrowing issue in his report. He amplified on it at deposition by further explaining the relationship between the cartridge's flat aspect ratio and burrowing. Disclosures under Rule 26(a)(2)(B) need not include each and every word that an expert ultimately uses at trial to explain his opinion. Indeed, it is perfectly permissible for trial testimony to "elaborate on" or provide "reasonable explanation" of the opinions contained in the expert report. Forest Labs., Inc. v. Ivax Pharms., Inc., 237 F.R.D. 106, 113, 116 (D. Del. 2006) (overruling defendant's objection to expert's testimony). See also Boehringer Ingelheim Int'l GMBH v. Barr. Labs., Inc., C.A. No. 05-700, 2008 WL 2756127, at *3 (D. Del. July 15, 2008) (expert's trial testimony was "a permissible synthesis of and/or elaboration on" the opinions in his report). Discussion of "aspect ratios" by Professor Slocum at trial would be entirely consistent with his expert report (and deposition) and therefore should be allowed.

III. CONCLUSION

For the above reasons, the Court should deny Kraft's motion *in limine* to limit Professor Slocum's expert testimony.

³ Professor Slocum's detailed explanation of "aspect ratios" during his deposition provided Kraft yet further notice on the issue. Preclusion would therefore be inappropriate. Forest, 237 F.R.D. at 110-11 (rejecting challenge to admission of expert opinion following bench trial where expert report itself – even absent further explanation through deposition testimony – "sufficiently disclosed the opinions").

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Dated: August 15, 2008

CERTIFICATE OF SERVICE

I, Karen E. Keller, Esquire, hereby certify that on August 15, 2008, a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court using CM/ECF which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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Exhibit A

CONFIDENTIAL – ATTORNEYS’ EYES ONLY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEURIG, INCORPORATED,

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KRAFT FOODS GLOBAL, INC.,
TASSIMO CORPORATION, and
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Defendants.

Civil Action No. 07-017 (GMS)

CONFIDENTIAL
ATTORNEYS’ EYES ONLY

RULE 26(A)(2)(B) REBUTTAL EXPERT REPORT OF
PROFESSOR ALEXANDER SLOCUM
MAY 13, 2008

CONFIDENTIAL – ATTORNEYS’ EYES ONLY

64. My tests of Lambert cartridges revealed that at least as much (and often much more) liquid exits through the inlet hole as through the outlet nozzle. While the liquid that exits through the outlet nozzle can be captured in a cup, the liquid that exits through the inlet hole cannot easily be captured and instead oozes out of the hole, dripping all over the cartridge and onto the floor. (Were the cartridge mounted inside a brewer, the coffee would of course drip into the brewer.)

65. My tests of both Lambert and Rychiger cartridges also revealed another set of fundamental problems with creation of an inlet through the foil. The foil over the coffee bed lacks any kind of support structure against which to press a gasket or other device to form a seal. (By contrast, the Tassimo T-Discs that are accused of infringement in this case are provided with a support structure, such that their lids are pierceable to accommodate an inflow.)

66. In a submission that I have reviewed, Kraft itself explained to the European Patent office (“EPO”) that, because a patent describing the Singles cartridge does not describe an appropriate support structure like that of the T-Disc, its lid is not pierceable to accommodate an inflow of water to brew a beverage. Specifically, Kraft submitted a patent application for a claim covering

A cartridge (1) containing one or more beverage ingredients (200) and being formed from substantially air- and water-impermeable materials, the cartridge defining a storage chamber (130; 134) containing the one or more beverage ingredients and a manifold chamber (16), the cartridge comprising an opening (12) through which the one or more beverage ingredients can be filled into the storage chamber, the opening being closed by a lid (5) having a first portion overlying the manifold chamber and a second portion overlying the storage chamber, **characterised in that** the first portion of the lid is pierceable in use to accommodate an inflow of an aqueous medium into the manifold chamber and the lid is pierceable in use to accommodate an outflow of beverage formed from interaction of the aqueous medium and the one or more beverage ingredients in the storage chamber.

(EP 1440913).

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67. The EPO initially rejected this claim on the theory that the Singles-type cartridge disclosed in a prior art Kraft patent described all of these features. In particular, the EPO reasoned that the disclosed cartridge technically included a lid with a “first portion overlying the manifold chamber” wherein that portion was “pierceable to accommodate an inflow of an aqueous medium into the manifold chamber” even though the cartridge was designed to be pierced on the opposite side for the inflow. (12/2/04 Communication Regarding EP Application No. 04 250 384.7).

68. Kraft successfully responded by emphasizing that the cartridge lacked a “suitable element” against which the inlet piercer could abut (so as to avoid “a large degree of leakage”) and therefore did not have a lid that was “suitable for being pierced to accommodate an inflow of aqueous medium into the manifold chamber.” (6/9/05 Response).

69. I agree with this analysis and in fact confirmed it empirically. When attempting to pierce the foil lid over the Kenco coffee bed to create an inflow, with different needles, at a variety of pressures, and in a variety of orientations, I experienced spewing of coffee and liquid that was difficult to control, and danger of burns. On one occasion I was burned by the hot liquid flowing over my rubber glove and onto my forearm.

70. The following photograph is one example of the dangerous conditions that resulted when I attempted to pierce the foil side of a Singles cartridge to form an inlet for hot water.

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71. The following table summarizes a series of tests that I performed, in conjunction with Ted Lingle, a coffee expert retained by Keurig.

Experiment	Orientation of Cartridge	Pressure	Time to Dispense 180 ml	Total Dissolved Solids
1	Foil down, with plate	3.2 psi	19 seconds	615 ppm
2	Foil down, with plate	15.7 psi	12 seconds	635 ppm
3	Foil up, with plate	14.7 psi	27 seconds	865 ppm
4	Foil up, with plate	15.4 psi	8.2 seconds	629 ppm
5	Foil up, with plate	3.4 psi	1 minute 6 seconds	674 ppm
6	Vertical, with plate; outlet nozzle at the bottom	3.1 psi	19.2 seconds	802 ppm
7	Vertical, with plate; outlet nozzle at the bottom	15 psi	13.72 seconds	769 ppm
8	Foil down, with plate; sealing tab removed	15 psi	9.13 seconds	220 ppm
9	Foil down, with plate; sealing tab removed	3 psi	18.67 seconds	327 ppm

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76. The tests revealed that the cartridge structure would not permit me to obtain a satisfactory seal at the inlet. Trying a variety of techniques, for example applying a metal plate to the foil side of the cartridge, and clamping the inlet hose with a pair of pliers, I was able to reduce but not eliminate the problem of water exiting the system at the inlet without entering the cartridge. In some cases, for example at higher pressures like those at which Singles cartridges are designed to operate, the spewing water became an even more serious problem, posing risk of burns as previously noted.

77. The tests also showed that even the water that did make it into the cartridge with the ground coffee did not brew a coffee beverage. Instead, the pressurized liquid (bypassing the manifold) shoots through the coffee grounds and literally burrows a hole:



78. The result was a liquid (in Mr. Taylor’s language, a “coffee liquor”) that I understand Mr. Lingle, an expert coffee “cupper,” does not consider a beverage within the meaning of the ‘762 patent. Although not a trained “cupper,” I am an avid coffee drinker and I concur that the liquids produced would not qualify as a beverage:

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Experiment 2



Experiment 8

79. To avoid risk of burns I performed another series of experiments using cold water. In this series of experiments, I tried not only the Singles piercer, but a thin (1/8" outside diameter) metal needle piercer akin to a "hypodermic" type needle. I ran the experiments at about 22 psi (within the expected pressure range for Singles cartridges)¹² and with a variety of parameters, including:

- Lambert-type and Rychiger-type cartridges
- orientation of the cartridge (vertical, foil up, and foil down); and
- with and without a metal plate covering the foil side (with a hole for the inflow piercer).

80. Consistent with my results described earlier in this report, I found that the Singles cartridges failed to exhibit appropriate consistent sealing capability at the inlet, and therefore were not able to accommodate an inflow to brew a beverage as required by the '762 patent claims. The following photographs are representative of the tests:

¹² I did not perform the hot water testing at 22 psi because the experiments would have posed an unacceptably high risk of burns from sputtering and spewing scalding water.

Exhibit B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

- - - - - x

KEURIG, INCORPORATED,

Plaintiff,

v.

KRAFT FOODS GLOBAL, INC., TASSIMO CORPORATION, and
KRAFT FOODS INC.,

Defendants.

Civil Action No. 07-CV-0017-GMS

- - - - - x

VIDEOTAPED DEPOSITION OF ALEXANDER H. SLOCUM

Wednesday, June 11, 2008

9:10 a.m. to 5:00 p.m.

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Reporter: Marianne R. Wharram, CSR/RPR

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REF: 87765

SLOCUM

philosophies or whatever why this type of approach for this type of aspect ratio cartridge I -- is my opinion fundamentally doesn't work well, if at all. If you delete the manifolds and you just do same-side piercing and with respect to can you actually same-side pierce something like this without making a mess, that's a separate -- separate issue, but just in terms of making a beverage, and I believe, as I described when I wrote my report, that when I run tests, I don't get a beverage in the definition of my palate or Mr. Lingle's expert opinion.

Q. Let me understand what you just said. First of all, when you said a cartridge, a rati-- what did you --

A. Aspect ratio.

Q. What is an aspect ratio of a cartridge?

A. Okay, so when you -- when you want to describe the aspect ratio of something -- so if I can have a pen?

Q. Here's a pen.

A. It's easier for me to point with this than a finger. This is a little flatter than your typical cartridge, but specifically, when I'm

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referring to aspect ratio, the length and the width of a coffee bed and what's those -- what are those proportions with respect to the depth between where you're putting in the fluid and where it wants to exit.

Q. All right.

A. Now, all these flat cartridges, I would say, have a flat aspect ratio. The depth is shallow.

Q. When you say these, you were pointing to something.

A. I'm sorry. The Singles cartridges or the cartridge from the '234 patent.

Q. Okay.

A. So when you go -- or the embodiment of Figure -- nominally, Figure 4.

Q. Right.

A. Now, compare those proportions to what I think is the actual useful embodiment of Figures 6, 7 and 8 of the '762 patent, which is that aspect ratio is more kind of one-to-one, the depth with here, and in the actual, these flat type cartridges, it's like three or four-to-one is the characteristic aspect ratio. The problem with just

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taking something of this aspect ratio and piercing, in the language of the patent, and then injecting your fluid is that the water, which comes in at a reasonable pressure, shoots right through the coffee, or whatever your drink is, into the filter and then rushes out your filter, so you don't get good wetting -- that's wetting, excuse me -- of the bed of -- and you end up putting through the required amount of fluid to fill your cup, but it really only acts on a small region of coffee, which is why I think it comes out so -- so weak and why I said yeck, it doesn't really taste like coffee. When you have a -- and that's why I believe the '234 and the Singles, they both have this manifolding system --

Q. All right.

A. -- to evenly wet. And I opened up cartridges from the Singles machine after they were used and I looked at the bed and I opened up the cartridges after I would do my test and I looked at the bed, and the tests I ran, you would always burrow a hole. And I can discuss more in terms of scientific principles of aspect ratios if you want.

Q. Please do.

SLOCUM

A. Oh, okay. So when you -- there's a fundamental principle called St. Benant's principle. It's B-E-N-A-N-T. And it says if you want to control or dominate the structure of something, you want to have three to four characteristic dimensions. So for example, if I want to, you know, hold on -- if I was to try to hold on to your arm and not have it move, if I just grabbed the wrist, even with two hands, you could pop your arm off, but if I were to grab the wrist and the elbow, which is, you know, like three to five arm thicknesses away, I could hold you pretty well. That also applies in fluid systems, and particularly mixing chambers, that if I have an inlet point and I want to now have mixing, I don't want my outlet point to be -- and the reciprocal is true -- one-third of a characteristic dimension away. I want it to be more than one. So when you look at this kind of an aspect ratio structure, a characteristic dimension of import is, you know, what is happening in the chamber. Well, the function is I want to as uniformly as possible mix the water with all the coffee to get all the flavoring out, so if I bring in my inlet point and

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A. I don't know.

Q. Okay. It is clear -- it says it is clear from context that the laminated foil is intended to cover compartment, 21, only. The outlet, 37, if covered, would be covered by a separate foil. What do you mean it's clear from context the laminate foil is intended to cover compartment, 21, only?

A. They only talk about covering the coffee bed region with foil. I don't have any indication that the teaching says continue the foil and also cover outlet, 37.

Q. Well, doesn't it say, quote, in use, a laminated foil is sealed along the lower edge, 23, of the body portion, and isn't this part of 23, lower edge of the body portion?

A. Well, yes and no. Sure, you could seal it everywhere as we just said. I'm not precluded from running one strip of foil everywhere, but no in the context of someone practicing it. I'm only going to put the foil where I need the foil. And there's nothing that teaches me that I need the foil over there. And like, again, the Lambert cartridges, for example, don't use foil. The Rychiger ones do have a covering, although not foil, so sometimes

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you do and don't. This is the outlet, 37, you're talking about, right?

Q. Right.

A. That's what I'm saying. Sometimes as practiced in the art 37 is covered and sometimes it's not. And I'm saying 37 as in figuratively, not this particular patent.

Q. Okay. The -- now, in paragraph -- excuse me. In paragraph six you say, if you turn to page two, paragraph 6, second sentence, moreover, the lid that is disclosed in the '234 patent is not pierceable to accommodate an inflow of liquid, paren, i.e., capable of being pierced to permit a flow of liquid into, end quote, based on the Court's claim construction to brew a coffee beverage that can be extracted through the same lid as required by the asserted claims. Do you see that?

A. I do.

Q. Just so I understand, it's not -- you said the lid is not pierceable. Now, is it -- you say it's not pierceable to accommodate an inflow of liquid. Is it not capable of being punctured to allow inflow of liquid? I'm just trying to see

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where the dispute is.

A. Okay. I think earlier this morning we did kind of a mapping between the Singles cartridge and this cartridge where I pointed out that on Figure 4, which is the other side, that the castellations on the bottom form essentially the same function as the filter paper.

Q. Right.

A. So I read this in terms again of the function that this cartridge has to do when I read the claim. So where I think we will have a problem -- there's two problem areas with this design and if we use it with -- using the input thing to punch through the foil here. The first problem area that we discussed extensively earlier was the issue of do we have a leak or a weep versus a catastrophic failure and I think we addressed that already in terms of all the different possibilities, but making the beverage, then we're going to have the same burrowing issue here as we do the aspect ratio problem I see of injecting water in here directly as opposed to bringing this water in through this encircling manifold.

Q. Mm-hmm. Okay. If you -- if you pierced up

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here within the manifold, would you have the same problem?

A. I don't think you'd have the -- well, you wouldn't have the burrowing issue.

Q. Right.

A. What you have here now, as I mentioned earlier, this aspect ratio problem. Now you're really severe on your aspect ratio, because your piercing device is on the order of the size of this dimension, but the foil goes way off on the other sides, and the foil -- my experience in playing with these things is you get kind of a trough shape and then the fluid definitely squirts out.

Q. Wouldn't the fluid go along the manifold?

A. No, this is not the fluid squirting out -- I mean, the fluid would go along the manifold, but it's very hard to make a -- I was not able to make a seal on this just playing with -- on the Singles cartridges, because the Singles cartridges also have that -- I wish we had one here -- zone on this manifold side that you could pierce way off on the edge.

Q. Yeah, but if you pierced in here, in the center, okay, it would distribute along the

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A. -- other than the normal we would vary by a couple of degrees, but not -- I didn't start like at 150 and go up in ten degree increments or anything, no.

Q. Let's go back to something. You, I believe, expressed the opinion that the patent requires you to -- that a full cup or near a full cup exit the container; is that correct?

MR. RADER: Objection. Mischaracterizes.

Q. (BY MR. SCHLITZ) Well, if I mischaracterized it, then please correct me. I'm just trying to understand. This is a predicate for the next question.

A. The cartridge, yes.

Q. Yes. Okay. And can you please point to me or explain to me what the basis of that belief is?

A. Well, the basis of that belief is that what the patent teaches, it's a beverage cartridge used in a brewer. Well, all the beverage cartridges I looked at, well, they all nominally will make a cup, 180 milliliters, of coffee, so I used that as my baseline, and if it -- it's to be in the teaching and intent, one skilled in the art, all

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the other terms we used before, that's what this thing needs to be able to do to satisfy the function of the claim and indeed the teaching and what the patent is trying to help us build.

Q. And if you only get a half a cup, the resultant -- what comes out of the container, or cartridge, okay, you wouldn't consider that a beverage?

A. I guess let me just paraphrase or clarify. If I made a half cup of something and then turned the flow of water off so no more water flowed into the cup, pulled it away, and here I had this half cup of coffee liquor, as it was described by our ex-- the coffeeologist, you do a TDS on that and the coffeeologist says that's an acceptable coffee, that's a coffee beverage, then my answer is yes.

Q. It would be half a cup of beverage?

A. It would be half a cup of beverage.

Q. Right. Okay. And you as one of ord-- you indicated in your footnote you consider yourself as one of ordinary skill in the art; is that right?

A. Yeah, whatever footnote in here we have, yes.

Q. All right. Okay. Without a -- without a

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SLOCUM

whatever you just called it, a coffeeologist or whatever, a Mr. Lingle next to you --

A. A cuppy -- a cupper, I think he refers to himself to.

Q. Well, I think you're misusing the word cupper.

A. Okay. I'm sorry. Without a Mr. Lingle next to me.

Q. How would you know if it's a resultant beverage?

A. I would taste it.

Q. Right. Would you test the TDS?

A. Oh, if I had a TDS meter I would, but I tasted all of these in addition to the -- I think he actually volunteered to taste some of them, so -- and I know what I like, but --

Q. And test six just didn't meet your liking; is that right?

MR. RADER: Objection to form. Go ahead.

A. What I appear to like personally is somewhere north of a thousand. You know, when I say somewhere north of a thousand, I think the actual -- did I write down what the actual number

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was out of the machine? I think it was around 1,200 or so. I think that's what the Kenco normally brews or whatever, and that's okay.

Q. (BY MR. SCHLITZ) So number six didn't meet your liking; is that correct?

A. Well, to be honest with you, 1 through 9, none of them met my liking. Some were downright awful, like 8 and 9.

Q. What was six?

A. You know, that's -- to me, that's just kind of brown water, but I mean, I can detect that there is coffee in it.

Q. Right.

A. And it smells like coffee. And when you taste it, if I ever bought that anywhere, I'd take it right back and say I want my money back or a real -- a real cup of coffee.

Q. But that's you.

A. That's me, that's Mr. Lingle, that's --

Q. Well, Mr. Lingle has a gold -- a silver tongue, doesn't he?

A. But that's me. That's me.

Q. That's you?

A. And I -- I consider myself an average

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assuming my I think pretty generous estimates there.

Q. Okay. Now, turning to page 21, paragraph 65, it says my problem -- my tests of both Lambert and Rychiger cartridges, you also get another set of fundamental problems with the creation of an inlet to the foil. The foil over the coffee bed lacks any kind of support structure against which to press a gasket or other device to form a seal. Okay. That -- in there, you were testing by piercing the foil sort of midpoint in the first chamber; is that correct?

A. Correct.

Q. Okay. And then you say by contrast, the Tassimo T-discs that are accused of infringing in this case are provided with a support structure such that the sides -- the lids are pierceable to accommodate an inflow, but -- so here you're saying that one of the things is you lack a -- a support structure, right?

A. Correct.

Q. Okay. But if we're using a -- this seal that you mentioned earlier, okay, would that still be a problem?

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planar or maybe pushed in just a little bit to start -- let the seal start to work, and that's where I would get, you know, these -- that's how I did my tests. If you -- if you held it out so the seal was never touching, then you always had disaster, because you --

Q. But if you put it slightly deeper, you'd have less seepage?

A. You would have a chance of it working sometimes. That's the weepage I was talking about earlier.

Q. And -- so I'm trying to understand what you just said. Are we talking about -- in what orientation?

A. All orientations.

Q. Let's take the vertical orientation. If you put the -- if you put the piercer in halfway, let's say, and you have a -- if you put the piercer in and you have a -- some type of rubber seal, okay, will it work?

MR. RADER: Objection to form. Go ahead.

A. The farther you push the piercer in, the weaker the cup of coffee, because the burrow

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A. Yes. Would you like me to explain why?

Q. Yes, please. Yeah.

A. So when you pierce through the foil, the cartridge itself is not that rigid and the foil has elasticity. And I can -- when you initially pierce, the foil bulges all the way in, I mean really far in. And when it finally pierces, pop, it snaps through. Now, I can push the seal up against the foil such that the foil is still deflected way in and the seal is pushing hard against the foil. And then a very curious thing happens. You can actually push it so the end of the nozzle pushes all the way up against the filter and you get no coffee. You get basically clear liquid.

Q. What if you don't? What if you don't?

A. So the harder and further you push in, the less weep, the less chance of catastrophic failure you get is what my preliminary test showed, but you get no -- you get no coffee, and no one would even argue, because then the liquid is almost clear. So the way I ran the tests were in the condition where the foil was nominally planar, and that's what -- I just put the pressure of the seal to keep the foil

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distance, your aspect ratio, really goes off then. The farther you push it in, the better your chance of sealing, and when I say chance of sealing, because every now and then you would get these catastrophic failures. I didn't run any -- enough tests with it pushed all the way in, which is where I'd notice I'd push it all the way in and I'd get this kind of clear dribble coming out, and I think on those I didn't see a catastrophic failure, but I just wasn't making anything that even began to even start to look like coffee, so I said this wasn't a real test. So I had to run my tests for meeting what I thought was the intent of the claims and the function and everything we've already been through in what was a realistic use of the system.

Q. So I can understand, in the '762 patent, if you look at figures -- well, look at Figure 5.

A. Okay.

Q. Will that work without a support structure?

A. Well, as I marked up here, you get burrowing, so it doesn't work in terms of you don't -- I don't feel you get a beverage. Will it work in terms of can I actually use this and not have catastrophic failure? Um, I don't think so.

Exhibit C

In The Matter Of:

***KEURIG, INCORPORATED v.
KRAFT FOODS GLOBAL, INC***

***MALCOLM E. TAYLOR
July 3, 2008***

***MERRILL LEGAL SOLUTIONS
101 Arch Street, 3rd Floor
Boston, MA 02110
PH: 617-542-0300 / FAX: 617-338-6075***

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<p>1 A. Yeah, it's a disposable.</p> <p>2 Q. You said you tested three or four cartridges?</p> <p>3 A. Yes. I didn't have many.</p> <p>4 Q. In what orientations did you have them?</p> <p>5 A. I had one upside down in the normal route. I had</p> <p>6 another one like this as in the test I had at Kraft.</p> <p>7 Q. How many did you do in each of those positions?</p> <p>8 A. Two of each probably.</p> <p>9 Q. And did you take contemporaneous notes of what you</p> <p>10 were doing?</p> <p>11 A. No. All I just -- all I wanted was a demonstration.</p> <p>12 I was putting hot -- I put in hot water through and</p> <p>13 the beverage I was having out of the other end was</p> <p>14 brown, so it was obviously absorbing coffee. That's</p> <p>15 all I have to do because that's all that's in the</p> <p>16 claim.</p> <p>17 Q. Did you see any water exiting through the hole where</p> <p>18 you had pierced?</p> <p>19 A. No, it wasn't in fact.</p> <p>20 Q. In any of your experiments?</p> <p>21 A. No.</p> <p>22 Q. To your knowledge you didn't actually pressurize the</p> <p>23 chamber, though?</p> <p>24 A. No. I mean I didn't because it's not mentioned in</p>	<p>1 A. Yeah, a little bit, and it had a coffee smell.</p> <p>2 Q. What temperature was the water that you injected?</p> <p>3 A. It was hot. It was out of a kettle actually, so it</p> <p>4 was as much as I could hold in the syringe because I</p> <p>5 didn't have any insulation.</p> <p>6 Q. Do you know what the temperature was?</p> <p>7 A. No, I don't. It would have been somewhere in</p> <p>8 between -- well, it might have been around 150 F</p> <p>9 maybe.</p> <p>10 Q. 150 degrees Farenheit?</p> <p>11 A. F, right.</p> <p>12 Q. Did you take any photos of the test?</p> <p>13 A. No, I didn't.</p> <p>14 Q. What did you do with the cartridges when you were</p> <p>15 done?</p> <p>16 A. I threw them out.</p> <p>17 Q. Then what did you do with the liquid?</p> <p>18 A. Also dumped it.</p> <p>19 Q. Did you take any notes on your observations of the</p> <p>20 test?</p> <p>21 A. No. Only what is in the report.</p> <p>22 Q. And how far in advance of preparing the report did</p> <p>23 you do the test?</p> <p>24 A. A week, a week or two probably.</p>
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<p>1 the claim at all.</p> <p>2 Q. How long did it take you to do the testing that you</p> <p>3 did?</p> <p>4 A. Couple of minutes.</p> <p>5 Q. Couple of minutes?</p> <p>6 A. Yeah.</p> <p>7 Q. How long did it take you to sort of design in your</p> <p>8 mind what the testing was going to look like?</p> <p>9 A. It was also minutes.</p> <p>10 Q. How did you secure the cartridge? Was it your wife</p> <p>11 holding it?</p> <p>12 A. Yes.</p> <p>13 Q. How much liquid did you get out of the outlet?</p> <p>14 A. Well, it was the excess of the amount of -- over the</p> <p>15 amount that was left in the chamber obviously, but</p> <p>16 it wasn't a huge amount because I wasn't aiming at</p> <p>17 any specific volume.</p> <p>18 Q. So you didn't measure the volume?</p> <p>19 A. No, I didn't measure it because it wasn't necessary.</p> <p>20 Q. Was it a couple of teaspoons?</p> <p>21 A. Yeah, probably.</p> <p>22 Q. Did you taste the liquid?</p> <p>23 A. No, I don't have to because it's not in the claim.</p> <p>24 Q. Did you smell the liquid?</p>	<p>1 Q. Now, it says in the footnote in your report that you</p> <p>2 did the hypodermic needle test on a Lambert-type</p> <p>3 cartridge with the open inlet?</p> <p>4 A. Right.</p> <p>5 Q. That was one of the three or four that you did?</p> <p>6 A. Yes.</p> <p>7 Q. What orientation did you do that one?</p> <p>8 A. One that was in the vertical because it's open. I</p> <p>9 mean actually that was the one I had to have</p> <p>10 inverted. I could have put something over the hole,</p> <p>11 but I didn't.</p> <p>12 Q. So you did that one vertically with the open hole</p> <p>13 toward the top?</p> <p>14 A. Upright, yeah.</p> <p>15 Q. What would normally be the inlet hole?</p> <p>16 A. Yes, right.</p> <p>17 Q. And you did that in order to avoid leakage out the</p> <p>18 hole?</p> <p>19 A. Yes, because obviously it would leak if I laid it in</p> <p>20 any other way.</p> <p>21 Q. If you had pressurized it, would it have leaked</p> <p>22 notwithstanding that the hole was at the top?</p> <p>23 A. Well, of course, yes.</p> <p>24 Q. Was the hypodermic needle normal to the surface of</p>